(8)

No. 88-1640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

DICK THORNBURGH, UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. In determining whether two competitively equal newspapers qualify for an antitrust exemption under the Newspaper Preservation Act, which requires that one of them be in "probable danger of financial failure," may the Attorney General approve the application on the basis of a construction of the Act that only requires (a) a showing that both papers have lost money for several years and (b) a statement by representatives of the "non-failing" paper that it will not raise its prices even if the exemption is denied?

2. Does this Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), require a reviewing court to defer to an administrative agency's expansive interpretation of an exemption from the antitrust laws where the agency's construction is at odds with the established rule that exemptions from the antitrust laws must be narrowly construed?

PARTIES TO THIS PROCEEDING

Petitioners Michigan Citizens for an Independent Press, Public Citizen, Senator John F. Kelly, W. Edward Wendover, David A. Kersh, William B. Cowan, Matthew Beer, and Murray Greenhalge, Jr., appeared as plaintiffs-appellants below.

Respondents United States Attorney General Dick Thornburgh, Detroit Free Press (owned by Knight-Ridder, Inc.) and The Detroit News (owned by Gannett Co.) appeared as defendants-appellees below.

In addition, the American Newspaper Publishers Association and Little Rock Newspapers, Inc. appeared as *amici curiae* in the court of appeals.

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OPINIONS BELOW

The opinions of the court of appeals' panel (Pet. App. 166a - 90a) are reported at 868 F.2d 1285. The opinions regarding the court of appeals' order denying rehearing *en banc* (Pet. App. 191-97a) are reported at 868 F.2d 1300. The opinion of the district court (Pet. App. 149a-63a) is reported at 695 F. Supp. 1216.[1]

[1] "Pet. App. __" refers to the separately bound appendix to the petition for a writ of certiorari. "J.A. __" refers to the joint appendix submitted with this brief.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989, and the order denying rehearing *en banc* was entered on February 24, 1989 (Pet. App. 164a, 199a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466, 15 U.S.C. §§ 1801-04, provides in pertinent part:

Section 1801. Congressional declaration of policy.

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

Section 1802. Definitions.

* * *

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

Section 1803. Antitrust Exemptions.

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication . . .

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

The Department of Justice's regulations pertaining to the Newspaper Preservation Act, 28 C.F.R. § 48 (1988), provide in pertinent part:

Section 48.10. Hearings.

(a) Upon the issuance by the Attorney General of an order for a hearing, the Assistant Attorney General for Administration shall appoint an administrative law judge in accordance with section 11 of the Administrative Proce-

dure Act, 5 U.S.C. 3105. The administrative law judge shall:

* * *

(4) Conduct a hearing in accordance with section 7 of the Administrative Procedure Act, 5 U.S.C. 556. At such hearing, the burden of proving that the proposed arrangement meets the requirements of the Newspaper Preservation Act will be on the proponents of the arrangement.

STATEMENT

1. On May 9, 1986, respondents Detroit Free Press (the "Free Press") and The Detroit News (the "News") filed an application with the respondent Attorney General for approval of a joint operating arrangement ("JOA") pursuant to the Newspaper Preservation Act (the "NPA" or the "Act"), 15 U.S.C. §§ 1801 *et seq.*

As will be explained more fully below, the Newspaper Preservation Act of 1970 is Congress's response to this Court's decision in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), which held that a pre-existing JOA violated the antitrust laws. Recognizing that this Court's stringent standard might impose a hardship on newspapers that had been operating under a JOA for many years, Congress retroactively approved JOAs where, at the time of the agreement, at least one of the newspapers was not "likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a). However, Congress adopted a more exacting standard for future JOAs, which are permitted only if one of the papers is a "failing newspaper," a term that the Act defines as a "newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1802(5). Congress also provided that, in order to obtain an antitrust exemption, post-1970 JOAs must first

be approved by the Attorney General. 15 U.S.C. § 1803(b).

Detroit is the nation's fifth largest newspaper market. The News, the nation's seventh largest newspaper, is Detroit's only afternoon newspaper, and the Free Press, the nation's eighth largest newspaper, is the dominant, daily morning newspaper. Pet. App. 7a, 14a, 15a. The Free Press has been owned by Knight-Ridder, Inc. ("Knight-Ridder") or its corporate predecessor since 1940. The News was owned by the Evening News Association until 1986, when it was purchased by Gannett Co., Inc. ("Gannett"). Gannett and Knight-Ridder are the two largest newspaper chains in the United States.

The application identified the Free Press as the "failing newspaper." Pet. App. 137a. The JOA provides that the Detroit market would be divided between the two newspapers for the next 100 years. Under the agreement, the News would eliminate its morning, weekday edition. It would publish only an afternoon daily newspaper, and the Free Press would publish only a morning newspaper. The JOA also provides that the newspapers would publish a joint edition on Saturdays and Sundays and that the news and editorial staffs of the two newspapers would remain independent. Pet. App. 114a-16a.

The newspapers would form a partnership known as "The Detroit Newspaper Agency," which would make all commercial decisions for both papers, including setting their sales prices and advertising rates. The News would receive 55% of the profits during the first year, but that percentage would decrease until the beginning of the sixth year, after which the profits would be divided evenly. Pet. App. 173a.

In accordance with the Department of Justice's regulations, 28 C.F.R. § 48.7 (1988), the application was referred to then-Assistant Attorney General for Antitrust Douglas H. Ginsburg, who concluded in a 70-page report that the applicants had not carried their burden of establishing that the Free Press was a failing newspaper. He pointed out that there is a serious question

as to why the News is "willing to share 50% of the profits of the JOA with the Free Press (after the first five years) if, as the parties assert, 'the inescapable conclusion [is] that the financial losses of the Free Press will continue indefinitely [absent a JOA].'" J.A. 89-90 (brackets in original). However, to give the applicants another opportunity to prove their case, Assistant Attorney General Ginsburg recommended that Attorney General Edwin Meese III appoint an administrative law judge to hear evidence. *Id.* at 93.

2. Attorney General Meese referred the application to Administrative Law Judge ("ALJ") Morton Needelman, who presided over a three-week evidentiary hearing, at which 16 witnesses testified, and at which the Justice Department's Antitrust Division opposed the application. Pet. App. 1a, 5a-6a. On December 29, 1987, Judge Needelman issued a 129-page Recommended Decision, in which he made numerous findings of fact and concluded that the JOA should be denied. *Id.* Although Attorney General Meese ultimately approved the JOA, he expressly "accept[ed] as accurate the fact findings of the Administrative Law Judge." Pet. App. 147a. Therefore, the findings of the ALJ must be considered in reviewing the Attorney General's decision.

The principal issue before Judge Needelman was whether the Free Press was in "probable danger of financial failure." 15 U.S.C. §§ 1802(5), 1803(b). In order to resolve this question, the ALJ had to determine why the Free Press had been losing money and whether it would continue to do so if the JOA were denied. Based on the evidence in the record, Judge Needelman made a number of critical factual findings.

First, Judge Needelman found that Detroit could support two profitable newspapers. Thus, he concluded that the Free Press's financial troubles were not due to any inherent weakness in the relevant market or to competition from suburban newspapers,

radio, or television. Pet. App. 95a-98a, 122a.

Second, he agreed with the Antitrust Division that the two papers are competitive equals. Pet. App. 31a, 32a-85a. Thus, although in 1960 the News had a "substantial lead (183,751) over the Free Press in daily circulation," by 1976 "the daily circulation battle ha[d] been fought to a virtual tie," and since then "the Free Press's share of total daily circulation [had] never [fallen] below 49%." Pet. App. 40a. While the News led in advertising, the Free Press was dominant in the critical morning market and had other clear advantages over the News. Pet. App. 31a-39a, 106a-108a. And the division of profits, which the ALJ concluded would be "essentially . . . 50/50" (Pet. App. 122a), was powerful evidence, as the Antitrust Division had argued (J.A. 116), that the papers themselves believed they were at competitive parity.

Third, the ALJ found that the Free Press had lost approximately $10 million per year since 1980, that the News had lost almost as much, and that the reason for these losses was that both newspapers' circulation and advertising prices were probably the lowest in the country for major daily newspapers. Pet. App. 70a, 76a, 82a, 84a; *see also* Panel Opinion at Pet. App. 172a. For example, the daily price of the News is fifteen cents, and the Free Press charges twenty cents. Pet. App. 172a. According to Judge Needelman, "[n]either paper can achieve profitability (or survive indefinitely if viewed on a stand-alone [basis]) so long as its parent-chain persists in its present strategy of sacrificing current profits for dominance and future profitability or a JOA." Pet. App. 122a. In other words, "Detroit cannot sustain two profitable papers when both are practically being given away." *Id.*

Fourth, Judge Needelman discussed the motivation for the low prices. He found that in 1981, after both papers had suffered their first year of losses in many years, the chief executive officers of Knight-Ridder, which owned the Free Press, and the Evening News Association, which then owned the News, had met and "emphasized that one or both newspapers needed to

continue to show losses in order to qualify for a JOA, and that with a few more years of such losses the prospects of a JOA would be 'ironclad.'" Pet. App. 19a. The ALJ also found that the Free Press subsequently adopted a marketing strategy with the objective of "achiev[ing] profitability through total market dominance . . ., and if that should fail, to force the News to accept a JOA on the Free Press's terms." Pet. App. 21a. Moreover, before purchasing the News in 1986, Gannett contacted Knight-Ridder "to determine if [it] was still interested in forming a JOA." Pet. App. 29a. The two newspaper chains then consummated the JOA only two months after Gannett purchased the News. Pet. App. 8a, 31a.

Fifth, Judge Needelman addressed the issue of whether the News was likely to raise its prices if the JOA were denied, which the News would have to do to return to profitability. This issue was critical because the ALJ found, and the Attorney General agreed, that a price rise by the News would enable the Free Press to become immediately profitable since it could then follow suit, eliminating any justification for a JOA. Pet. App. 95a-100a, 122a, 143a n.3. On this issue, the ALJ found that the applicants had not met their burden of proving that the News was likely to continue to keep its prices low (and thereby to lose money indefinitely). Pet. App. 92a, 132a; *see also* 28 C.F.R. § 48.10(a)(4) (1988) (burden of proving all pertinent issues on the proponents of the JOA). Instead, the ALJ concluded that the papers might raise their prices if the JOA were denied. Pet. App. 92a.

Summarizing the discussion portion of his opinion, Judge Needelman concluded that "[i]t remains to be seen whether without a JOA these interdependent firms will modify their competitive strategies in the face of the equally strong certainty that should present tactics persist the result will be continued losses for both." Pet. App. 132a. Having found that the applicants had not carried their burden of proving that the Free Press was in "probable danger of financial failure," Judge Needelman recommended that the Attorney General deny the application.

Pet. App. 133a.

3. On August 8, 1988, four days prior to leaving office, Attorney General Meese rejected the recommendations of the ALJ and the Antitrust Division and approved the application. He made no independent fact findings, but instead expressly accepted those of the ALJ. Pet. App. 147a. Indeed, the Attorney General did not cite any record evidence, but instead relied only on the findings of the ALJ. Pet. App. 136a-48a.

In his opinion, the Attorney General pointed out that the Free Press had sustained substantial losses since 1980 and that the News was ahead in terms of circulation and advertising revenue. Pet. App. 140a. However, he also recognized that the News had "suffered sizeable operating losses," and also had not "mov[ed] toward a position of market dominance." Pet. App. at 139a-40a. Like the Free Press, "the pricing and discount strategies adopted and maintained by the *News* so as to retain its market position defeated all prospects for its achieving profitability as well." Pet. App. at 140a.

Attorney General Meese found that both papers could become profitable if circulation and advertising prices were increased, but he concluded that the Free Press could not increase its prices unless the News did the same. Pet. App. 143a. Relying on testimony of Gannett officials that the News would not raise prices if the JOA were denied, he ruled that it was "probable" that the Free Press was in "danger of financial failure." Pet. App. 144a.

Attorney General Meese also concluded that the "prediction" of Knight-Ridder's chief executive officer ("CEO"), "who promised to recommend a closing of the *Free Press* if the JOA application is disapproved," could not be "wholly disregarded." Pet. App. 144a. However, he cautioned that this testimony could not be given "undue weight," citing a finding by Judge Needelman that: (1) the record "contains no convincing evidence that [the CEO] seriously considered closing the Free Press prior to his

witness stand bolt out of the blue"; (2) there was no evidence that the Knight-Ridder Board had considered this recommendation, but, "on the contrary, the record shows that the Knight-Ridder Board has approved costly Free Press expansions and the newspaper's executives have been proceeding on the assumption that the Free Press would not be closed even if the JOA were to be denied"; and (3) "Knight-Ridder has never shut down a single paper, and [the CEO] did not rule out finding a buyer interested in operating the Free Press should it ever reach the point when Knight-Ridder would no longer wish to challenge Gannett for the rich Detroit market." *Id.;* Pet. App. 104a-05a.

Finally, the Attorney General addressed the argument that "the prospect of a JOA, not competition for market domination, was responsible most recently for the papers' reluctance to increase prices and eliminate discounting." Pet. App. 145a-46a. Recognizing that the desire to obtain a JOA was a factor in its below-cost pricing strategy, he concluded that Knight-Ridder was "principally" pursuing the goal of market domination and accordingly approved the JOA. Pet. App. 146a-47a.[2]

4. Petitioners filed this case in the United States District Court for the District of Columbia on August 16, 1988. Petitioners are Michigan Citizens for an Independent Press ("Michigan Citizens"), Public Citizen, and six individuals. Michigan Citizens has over 500 members, including approximately 200 employees of either the News or the Free Press, more than 300 readers, and 13 advertisers of one or both papers.

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[2]In a footnote, the Attorney General noted that after the ALJ's decision, Knight-Ridder made certain "maneuvers" in order "to underscore its corporate intention to close the *Free Press* if there is no approval of the JOA." J.A. 150 n.4. Since these efforts occurred *after* the hearing record had been closed, the Attorney General stated that he had not considered them. *Id.* For the same reason, this Court should not give weight to Knight-Ridder's restatement of this threat. *See* Detroit Free Press Brief in Opposition to the Petition for Writ of Certiorari, pp. i, 3, 7, 9, 22.

The individual petitioners represent the same range of interests as Michigan Citizens. Public Citizen is a national consumer organization which brought this action on behalf of its members in the Detroit area, as well as its members nationwide who might be adversely affected by the precedent that would be established if the JOA in this case were approved. The defendants below and respondents here are the Attorney General of the United States, the Free Press, and the News.

On August 17, 1988, District Judge Joyce Hens Green stayed the Attorney General's order. J.A. 169. Thereafter, District Judge George H. Revercomb ruled against petitioners on the merits. Pet. App. 149a. Relying on *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), Judge Revercomb concluded that the courts were required to "grant considerable deference" to the Attorney General's interpretation of the NPA. Pet. App. 155a. Although he described as "disconcerting" the Attorney General's response to the argument that the newspapers would not have engaged in reckless, destructive competition without the cushion of a JOA (Pet. App. 160a), Judge Revercomb held that the Attorney General's decision was not arbitrary or capricious. Pet. App. 162a.

A divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. After reviewing the statutory language and its legislative history, Judge Laurence Silberman, joined by Judge Spottswood W. Robinson, III, held that the "exact meaning" of the term "probable danger of financial failure" was "not apparent" and that, under *Chevron*, the Attorney General's interpretation of the statute was permissible and must be upheld. Pet. App. 178a. The panel then held that the Attorney General had the discretion to find that the Detroit JOA applicants had met the requirements of the NPA.

The panel implied that the result would have been different if it had applied the rule of statutory construction that exemptions from the antitrust laws are to be narrowly construed. Pet. App.

180a. It declined to apply the rule in interpreting the Newspaper Preservation Act, however, finding the statutory language ambiguous. The Court, therefore, held that the Attorney General was free to ignore the rule in the exercise of his discretion. Pet. App. 180a-81a.

Judge Ruth B. Ginsburg dissented and would have remanded the case to the Attorney General for further consideration. Pet. App. 191a-97a. In her view, the structure of the statute, its legislative history, the antitrust rule, and the burden of proof which JOA applicants bear all demonstrated that the Attorney General had not correctly interpreted the legal standard that Congress had adopted in the NPA. Pet. App. 194a-96a. She also was concerned that "[m]aking the JOA an option now, in the situation artificially created and maintained by the Free Press and the News, moves boldly away from the 'frame of reference [Congress] essentially embraced'" in the NPA. Pet. App. 197a, *quoting* Attorney General's Decision and Order at Pet. App. 146a.

The court of appeals denied a petition for rehearing *en banc* by a vote of 5-4. Chief Judge Wald, in an opinion joined by Judges Mikva and Edwards, dissented on the ground that the predicate for the Attorney General's decision — that if the JOA were denied, the News would not raise its prices, causing the Free Press to continue to lose money — made "no economic sense" because such a course of action would mean that the News would also continue to suffer deep losses. Pet. App. 205a. She pointed out that the News's strategy amounted to predatory pricing, behavior which is inconsistent with the purposes of the antitrust laws and which the NPA does not authorize. Pet. App. 208a-09a. In response, the panel majority emphasized that its decision was required by "*Chevron's* restraining leash." Pet. App. 200a.[3]

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[3]Judges Starr and D.H. Ginsburg did not participate. Judge Ruth B. Ginsburg voted to grant rehearing *en banc*, but did not join Chief Judge Wald's opinion.

On March 20, 1989, this Court vacated the stay of the JOA that had previously been issued, removing the only legal obstacle to implementation of the JOA. Nevertheless, the newspapers have not consummated the joint operating arrangement. The Court granted the petition for a writ of certiorari on May 1, 1989.

SUMMARY OF ARGUMENT

I. The Newspaper Preservation Act did not authorize the Attorney General to approve the Detroit JOA application. Congress preferred competition to joint operation, and therefore it intended the "probable danger of financial failure" standard to be narrowly construed. The antitrust exemption is available only where it is likely that one of the newspapers would otherwise be eliminated by normal market forces.

Evidence of Congress's intent is found in the Act's language, its statement of policy, its structure, and its legislative history. In the past, the Justice Department has consistently followed the direction in the legislative history that the NPA incorporates the standard in the Bank Merger Act, as interpeted by this Court in *United States v. Third National Bank*, 390 U.S. 171 (1968). *Third National Bank* requires an exploration of alternatives to a merger and denies an analogous antitrust exemption to banks whose financial failure is attributable to mismanagement or other improper practices.

The Attorney General's decision upsets the balance that Congress struck. Under his interpretation of the NPA, profitable newspapers in competitive markets would have an incentive to engage in price wars with the goal of achieving dominance and monopoly profits or, alternatively, approval of a lucrative JOA. One newspaper would only have to lower prices to the point where both it and its competitor were losing substantial sums of money. If the competitor survives, then the papers would qualify

for an antitrust exemption, as long as officials from the paper not designated as "failing" testify that they will not raise their prices regardless of whether the JOA is denied.

This interpretation of the Act must be evaluated in light of settled antitrust doctrine which holds that in healthy, competitive markets, predatory pricing strategies "are rarely tried, and even more rarely successful." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). As the ALJ found, the reason that the newspapers in Detroit were willing to bear substantial losses for a sustained period of time was that they believed that they could qualify for a JOA if one of the papers did not prevail. Even the Attorney General and the panel majority below concluded that the prospect of a JOA was a factor in the reckless competition that had occurred in Detroit. *Matsushita* teaches that newspapers are unlikely to adopt such a scheme if an antitrust exemption is not available as a consolation prize.

If the strategy employed here is rewarded with an exemption from the antitrust laws, then it is likely that newspapers in other, competitive markets will follow the Detriot example. This interpretation of NPA would subvert one of its basic goals, which was to preserve competition in the newspaper industry. Therefore, the Attorney General's approval of the antitrust exemption must be set aside.

II. Nothing in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), required the court of appeals to defer to the Attorney General's expansive construction of the NPA. To the contrary, this Court's established precedents require that the Newspaper Preservation Act, like all other exemptions from the antitrust laws, be construed narrowly. *See, e.g., Group Life and Health Insurance v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). Although *Chevron* was decided after *Royal Drug*, it explicitly directs courts to use "traditional tools of statutory construction" to determine whether "Congress had an

intention on the precise question at issue" (*id.* at 843 n.9), which includes use of the antitrust rule. This rule must also be used in determining whether the Attorney General's interpretation of the Newspaper Preservation Act is reasonable and supportable. *Federal Maritime Commission v. Seatrain*, 411 U.S. 726, 731 (1973).

Other factors counsel against giving any special deference to the Attorney General's construction of the NPA. The most important consideration is the lead role that the courts have historically taken in interpreting the antitrust laws. Indeed, the NPA's legislative history demonstrates that Congress assumed that the task of resolving legal issues arising under the Act would remain the province of the courts. Moreover, the Attorney General has no expertise in the antitrust field, and he rejected the recommendation of the expert Antitrust Division. Finally, the NPA does not require the resolution of competing policy issues since Congress made the important choices in the Act.

ARGUMENT

I. APPROVAL OF THE DETROIT JOINT OPERATING ARRANGEMENT IS CONTRARY TO THE NEWSPAPER PRESERVATION ACT.

A. The NPA May Not Be Interpreted to Encourage Profitable Newspapers to Engage in Behavior Leading to Approval of a JOA.

The Newspaper Preservation Act was Congress's response to *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). In that case, this Court affirmed a decision against two newspapers in Tucson, Arizona, that had been operating jointly since 1940 under an agreement that provided for price fixing, profit sharing,

and market control. It held that their agreement violated sections 1 and 2 of the Sherman Antitrust Act, as well as section 7 of the Clayton Act, 15 U.S.C. §§ 1, 2, 18, unless the papers could meet the traditional failing company test spelled out in *International Shoe Co. v. FTC*, 280 U.S. 291 (1930). The Court then ruled against the newspapers since they had been unable to demonstrate that, at the time they entered into the agreement, one of them was "on the verge of going out of business." 394 U.S. at 137.

At that time, 59 newspapers in 22 cities were published pursuant to joint operating agreements. H.R. Rep. No. 1193, 91st Cong., 2d Sess., p. 4 (1970). Some of these agreements were more than 30 years old (*id.* at 5), and a significant number had received approval from the Department of Justice. *The Newspaper Preservation Act: Hearing on H.R. 279 Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 91st Cong., 1st Sess., pp. 22-23 (1969) (hereinafter "*1969 House Hearings*") (statement of Rep. Matsunaga). Even before this Court's decision in *Citizen Publishing*, the Senate had held hearings to consider the potential impact of the Justice Department's decision to initiate antitrust lawsuits against newspapers that were parties to JOAs. *The Newspaper Preservation Act: Hearings on S. 1312 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. (1967).

The issue was extremely controversial. More than 40 bills were introduced; 28 days of hearings were held; and the debates consume 100 pages of the Congressional Record. As enacted, the NPA adopted two distinct standards for JOAs, depending on whether the agreement was executed before or after July 24, 1970, the Act's effective date. Recognizing that a demanding standard might pose a hardship for the newspapers that had been operating under a JOA for many years, Congress provided that pre-enactment JOAs would be exempt if, at the time of the initial

agreement, one of the parties to the agreement was not "likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a). This provision has had the effect of grandfathering the pre-1970 JOAs.

Initially, the Senate sponsors proposed that this same standard govern post-enactment JOAs. S. 1520, 91st Cong., 1st Sess. § 3(5) (1969). However, the Senate Judiciary Committee modified the bill to include papers either "unlikely to remain or become a financially sound publication" or in "probable danger of failure," and the Senate enacted the bill in that form. S. Rep. No. 535, 91st Cong., 1st Sess., pp. 1-2 (1969); 116 Cong. Rec. 2 017-18 (1970). The House rejected the Senate's definition of failing newspaper for future JOAs and passed a bill which limited a "failing newspaper" to one in "probable danger of financial failure." 116 Cong. Rec. 23,179-80 (1970). This narrow standard was enacted into law. 15 U.S.C. § 1802(5).

The legislative history underscores the statutory language; it demonstrates that the House approach contained a "tougher" and "much more stringent" standard than the "not likely to remain or become financially sound" standard which applied to pre-1970 JOAs. 116 Cong. Rec. 23,154-55 (1970) (remarks of Rep. Railsback).[4] In his introductory remarks as floor manager of the bill, Representative Kastenmeier explained that the bill had gone through three generations, with the exemption being narrowed each time. 116 Cong. Rec. 23,146 (1970). In the third stage of consideration, Representative Railsback had "further limited the bill to provide a far more stringent test for any future joint operating agreements." *Id.* In contrast to the "relatively more liberal standard" applicable to existing arrangements, Representative Railsback later assured the House of Representatives that

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[4] *See also* H.R. Rep. No. 1193, *supra*, p. 10 (standard applicable to pre-1970 JOAs "less strict" than standard applicable to post-1970 JOAs).

the "prospective availability of the exemption has been sharply restricted." *Id.* at 23,154. Thus, in the end, Congress adopted a standard which would promote competition and would require that the antitrust laws continue to apply to newspapers, unless a JOA was "demonstrably essential" to prevent one newspaper from closing. 116 Cong. Rec. 23,418 (1970) (remarks of Rep. McCulloch). In that situation, the Act authorizes the Attorney General to grant an exemption from the antitrust laws because Congress preferred two newspapers operating under a JOA to a single, monopoly paper.

The debate over the scope of the exemption demonstrates that Congress was concerned that healthy newspapers might be tempted to take advantage of the Act. The reason for this concern is obvious: newspapers can make far greater profits in a shared monopoly market than in a competitive one. For example, while neither Detroit paper has earned more than $14 million during any year since 1963, Gannett projects that after four years the Detroit JOA would earn $100 million in yearly profits. Pet App. 76a-77a, 84a-85a; J.A. 25.

The NPA and its legislative history demonstrate that Congress intended to ensure that the Act would not encourage newspapers to alter their behavior in order to obtain a JOA. The Act defines "failing newspaper" as newspapers that are in "probable danger of *financial* failure." This definition excludes newspapers that might fail for other reasons, including the desire to obtain an exemption from the antitrust laws. This prohibition is reinforced in the statement of policy, which emphasizes "the public interest of maintaining a newspaper press [that is] competitive in all parts of the United States." 15 U.S.C. § 1801. Congress also explicitly directed the Attorney General to insure that approval of a JOA would "effectuate the policy and purpose" of the Act, 15 U.S.C. § 1803(b), which even Attorney General Meese recognized would preclude him from approving a JOA for a failing paper that had lost money *solely* in order to obtain the exemption. Pet.

App. 114a, 145a-46a.[5]

The legislative history of the NPA also demonstrates that Congress intended that the exemption would not be available to newspapers that could technically qualify as "failing," but for which conferring an antitrust exemption would be inappropriate in light of the purposes of the NPA. For example, the Senate Judiciary Committee's report stated that the "probable danger of financial failure" standard should be read in light of *United States v. Third National Bank,* 390 U.S. 171 (1968), where this Court narrowly interpreted the antitrust exemption in the Bank Merger Act, 12 U.S.C. § 1828(c)(5)(B). S. Rep. No. 535, *supra,* p. 2; *accord*, 116 Cong. Rec. 23,146 (1970) (remarks of Rep. Kastenmeier). This reference to *Third National Bank* is significant because that case held that an analogous antitrust exemption required banks to "reliably establish the unavailability of alternative solutions to the woes" of the bank in order to obtain the exemption. 390 U.S. at 190.

The Justice Department has historically used the *Third National Bank* standard as a benchmark in considering JOA applications. The case was discussed at length in the Antitrust Division's Report when newspapers in Cincinnati, Chattanooga and Seattle applied for JOAs in 1977, 1980 and 1981.[6] The Ninth

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[5]The district court recognized that the Attorney General's formulation of this issue — whether "the prospect of a JOA, not competition for market domination, was responsible most recently for the papers' reluctance to increase prices and eliminate [advertising] discounting" (Pet. App. 146a) — was a "strawman." As the court correctly pointed out, a "key concern of both the ALJ and the chief of the Justice Department's Antitrust Division" was that "both newspapers felt free to adopt bold strategies of price-cutting in an effort to gain market domination because they were secure in the belief that 'failure too had its reward in the form of JOA approval.'" Pet. App. 160a, *citing* ALJ Recommended Decision at Pet. App. 121a, 132a-33a.

[6]Report of the Assistant Attorney General, Public File No. 44-03-24-4, pp. 18-22 (January 6, 1978) (Cincinnati); Supplemental Report of the Assistant

(footnote continued)

Circuit relied on this standard in *Committee for an Independent P-I v. Hearst,* 704 F.2d 467, 476 (9th Cir.), *cert. denied,* 464 U.S. 892 (1983). Both the Antitrust Division and the Administrative Law Judge adopted the standard in this case as well. J.A. 101-02; Pet. App. 125a-26a.

The *Third National Bank* standard required Attorney General Meese to look behind the losses that the Free Press had suffered and to consider both whether the losses were caused by mismanagement and whether there were reasonable alternatives to the JOA that could avoid the necessity of joint operation. As Judge Silberman observed in his opinion for the panel majority, under *Third National Bank,* and thus under the NPA, "strong evidence of probable failure was required." Pet. App. 178a.

The final hurdle imposed by the Act, recognized by the Department of Justice, is that "the burden of proving that the proposed arrangement meets the requirements of the Newspaper Preservation Act [is] on the proponents of the arrangement." 28 C.F.R. § 48.10(a)(4) (1988). Only by imposing a rigorous standard on JOA applicants can Congress's interest in reserving the exemption for newspapers that otherwise would likely have ceased publication be protected.

At various times in the proceedings concerning the Detroit JOA, the parties, including petitioners, have suggested comprehensive definitions of "probable danger of financial failure." For example, the Administrative Law Judge concluded that "there must at least be convincing evidence of an irreversible economic condition that would produce domination and a downward spiral," where declining circulation and advertising revenues feed each other until the newspaper is forced to close. Pet. App.

Attorney General, Public File No. 44-03-25-5, pp. 17-19 (June 2, 1980) (Chattanooga); Report of the Assistant Attorney General, Public File No. 44-03-26-6, pp. 7-9 (May 29, 1981) (Seattle). Copies of these reports have been lodged with the Clerk of the Court.

126a. However, in this case, the Court need not formulate an all-inclusive test, but can overturn the approval of the application because the prospect of a JOA was an essential factor in the Free Press's losses and because approval of the Detroit application would jeopardize healthy newspapers in other cities.

B. The Attorney General Violated the NPA Because His Decision Significantly Increases the Likelihood That Otherwise Profitable Newspapers Will Obtain JOAs.

As the Attorney General indicated in his decision, in enacting the NPA, Congress's "frame of reference essentially embraced the scenario of a strong newspaper poised to drive from the market a weaker competitor experiencing the 'downward spiral' phenomenon due to external market forces," and this is how the NPA has "[t]raditionally" been applied. Pet. App. 141a, 146a. It is undisputed, however, that "[n]o such description fits either newspaper here." Attorney General Decision and Order at Pet. App. 141a. In addition, the Attorney General found that the newspapers' losses were not due to any inherent weakness in the Detroit market, and that in fact "the Detroit market *could* sustain two profitable newspapers" if prices were in line with the prices charged in other cities. Pet. App. 143a (emphasis in original).

In section 1 below, we discuss the Administrative Law Judge's findings, which were all adopted by the Attorney General. Pet. App. 147a. In section 2, we demonstrate that the Attorney General's interpretation of the Act is contrary to Congress's intent and that it would significantly increase the likelihood of additional JOAs in markets that would remain competitive under a proper interpretation of the Act.

1. The Record Establishes That the News and the Free Press Are Competitive Equals in a Market That Can Support Two Newspapers and That the Free Press Has Not Lost Ground in Recent Years.

In their public announcement of the JOA, Knight-Ridder and Gannett declared that "[o]ver a period of more than a quarter century since this became a two-newspaper city, the Free Press and The News have fought to a virtual draw." Pet. App. 31a. The Administrative Law Judge concluded that this statement accurately described the relative positions of the two newspapers (Pet. App. 31a-85a), a finding that Attorney General Meese did not disturb and implicitly accepted. Judge Needelman based this finding on a number of critical, undisputed facts.

First, as the Antitrust Division had emphasized, prior to applying for the JOA, the Free Press had not been losing ground to the News. J.A. 101-06. Between 1976 and 1986, when the JOA application was filed, the Free Press's share of daily circulation never fell below 49%. Pet. App. 41a. As the Antitrust Division also pointed out, competition today "is as close, or closer, than it was a decade ago." J.A. 97.

Judge Needelman further found that as recently as 1985 — a year before the papers negotiated the JOA — Knight-Ridder executives believed that the Free Press was in a position to become the dominant newspaper in Detroit. Pet. App. 24a-25a. One key factor was the Free Press's commanding lead in the critical morning market, which was thought to give it a substantial long-term strategic advantage over the News. In fact, in 1985, Knight-Ridder concluded that its campaign to gain circulation for the Free Press was working so well that it justified a $22.3 million capital investment for an expansion of one of the paper's printing plants. Pet. App. 25a-26a.

Although this additional capacity was designed to benefit the Free Press in its battle with the News, it was not scheduled to be

available until six months after the JOA application was filed. Pet. App. 27a. In fact, Judge Needelman concluded that "as late as June 1986 [a month after the JOA application had been filed], Lawrence, the Free Press's publisher, was planning for an expansion 'regardless of the outcome of the JOA.'" Pet. App. 104a n.242. As Judge Needelman found, the decision to expand the printing plant "indicated confidence in the [1985] predictions of Free Press executives that the investment would eventually bring dominance . . .." Pet. App. 25a.

Second, the ALJ endorsed the Antitrust Division's argument that the 50/50 profit split between the News and the Free Press was persuasive evidence that the papers themselves did not believe that the Free Press was in "probable danger of financial failure." Pet. App. 113a-14a; 122a; J.A. 115-17. According to the testimony of the Antitrust Division's expert witness, which was adopted by Judge Needelman, "the JOA profit split represents a recognition by Gannett that the Free Press would remain in existence for at least seven to ten years; otherwise, Gannett would have found it more profitable to wait for the Free Press to fail." Pet. App. 113a. The profit split alone is telling evidence that neither newspaper had a significant edge when they submitted their JOA application. Moreover, the ALJ found that, during the JOA negotiations, it was an open question which paper would be designated as "failing," a finding that further buttresses the conclusion that the newspapers were essentially competitive equals. Pet. App. 30a.

Third, the ALJ concluded that the Free Press was a healthy paper and had a number of competitive advantages over the News. The most important evidence on this issue is a January 20, 1986 memorandum from Knight-Ridder's CEO, on behalf of the Free Press, to Gannett's CEO, which the ALJ reprinted in full in his Recommended Decision (Pet. App. 32a-38a). This memorandum was written about the time Gannett acquired the News, less than two months before the papers signed the JOA. Accord-

ing to the memorandum:

> the Free Press has "clear leadership in the critically important morning field" (Pet. App. 32a);
>
> "the Free Press has greater overall readership" than the News (Pet. App. 34a; *see also* Pet. App. 55a);
>
> "the Free Press is the dominant daily paper among adults in virtually all upscale demographic categories" (Pet. App. 35a);
>
> over the five previous years, the Free Press's circulation figures had improved in every area, and it had outgained the News in a number of important areas (Pet. App. 33a-34a);
>
> "[t]he Free Press has improved [its] advertising share of field over time" (Pet. App. 33a, 36a);
>
> the Free Press has won far more journalistic prizes than the News (Pet. App. 37a);
>
> according to the Free Press's CEO, "we think the figures reflect the Free Press' increasingly strong competitive position" (Pet. App. 34a).

Although Judge Needelman credited the applicants' testimony that this memorandum was written to argue the Free Press's case during the JOA negotiations, he concluded that it "was a reasonable summary of the data available at that time." Pet. App. 39a.

Furthermore, just two months prior to signing the JOA, John W. Morton, one of the expert witnesses for the applicants and a nationally recognized newspaper analyst, "was of the view that if the Detroit newspaper war was to continue, the News was 'at greater risk' than the Free Press." Pet. App. 112a. According to Judge Needelman, "Morton saw a ten-year trend favoring the Free Press and he emphasized that because of its strong morning

franchise it was positioned to avoid the downward spiral and overtake the News." *Id.* As the Antitrust Division summarized the facts in its Post-Hearing Brief, "[a]lthough the record shows that the Free Press has not achieved its stated goal of dominance in the Detroit market, it also shows that until the very moment the JOA was announced, Free Press executives believed that substantial progress was being made." J.A. 113.

2. The Attorney General's Decision Improperly Turns the NPA Into a Statute That Encourages Conduct That Will Lead to Reduced Competition.

During the five years prior to applying for the JOA, the News and the Free Press lost an average of nine and eleven million dollars per year, respectively. Pet. App. 77a, 85a. According to the Attorney General and the ALJ, the reason for these losses was below-market pricing of both circulation and advertising. Pet. App. 143a n.3. Yet the Attorney General concluded that the papers were entitled to a JOA because the Free Press had no unilateral way out of its loss position: as long as the News was willing to continue to incur heavy losses, the Free Press could not raise its prices without losing circulation and advertising. Pet. App. 143a. To support his conclusion that the Free Press would not raise its prices, the Attorney General relied on testimony from the News's chief executive officer that it would continue to sustain large losses in an effort to gain dominance over the Free Press, even if the JOA were denied. Pet. App. 143a-44a.

This interpretation of the Act gives profitable newspapers in competitive markets a roadmap for obtaining a lucrative antitrust exemption. The first step would be for one paper to set its advertising rates and circulation prices significantly below the level necessary to make a profit. The second paper would then have to lower its prices in order to maintain its competitive position. Soon both papers would be losing money, and neither

would have a unilateral way to become profitable. Relying on the Attorney General's interpretation of the Act, after several years of losses, either paper could then be designated as "failing" so long as its competitor testified that it would not raise prices even if the JOA were denied. Pet. App. 141a, 142a-44a; *see also* Panel Opinion at Pet. App. 176a, 177a, 184a-86a.[7]

The problem with this interpretation of the NPA is that it provides an incentive for newspapers in healthy markets to engage in conduct that will lead to losses and eventually an exemption from the antitrust laws. Thus, absent the fall-back of a lucrative JOA, there would be no reason for any newspaper to assume the enormous risk of losing money for years in the hope of driving a competitor from the market. As Chief Judge Wald pointed out, "[c]lassic economic principles and basic antitrust law run counter to *any* prediction that sophisticated firms will pursue below-cost pricing strategies over the long haul."[8] This is because "predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). Thus, intentionally incurring substantial losses would be rational and likely if, and only if, a government bailout, in the form of a JOA, would be available if the predatory pricing scheme should fail. If Congress's basic policies are to be preserved, the NPA may not be interpreted to reward or encourage such behavior.[9]

[7]The possibility of one newspaper driving an unwilling competitor into a JOA is not idle speculation. As described in the *amicus curiae* brief of Little Rock Newspapers, Inc. (publisher of the *Arkansas Democrat*), Gannett, the owner of The Detroit News, has cut prices and thereby transformed the *Arkansas Gazette*, which it also owns and which competes with the *Arkansas Democrat*, from a profitable newspaper into one that is losing several million dollars per year. On August 14, 1988, six days after the Attorney General approved the Detroit JOA, but before this case had been filed, Gannett increased the pressure on the *Arkansas Democrat* by further cutting the *Gazette's* circulation price to all subscribers, this time by 57.5%. *Amicus Curiae* Brief, p. 2.

[8]Pet. App. 207a (emphasis in original), *citing* McGee, *Predatory Pricing Revisited*, 23 J.L. & Econ. 289, 291-300 (1980); R. Bork, *The Antitrust Paradox*, 144-59 (1978); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 697-704 (1975).

The fact that the NPA expressly prohibits predatory pricing by newspapers operating under a lawful JOA further bolsters the proposition that the Act should not be interpreted to reward such schemes. 15 U.S.C. § 1803(c) (Act not to "be construed to exempt from any antitrust law any predatory pricing"). Even the panel majority recognized the legitimate concern that, after the Attorney General's interpretation of the NPA, "[n]ewspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be *assured* a soft landing." Pet. App. 189a (emphasis added). The panel majority, however, held that the Attorney General had discretion to adopt this interpretation of the Act, without regard to its impact on competition.

The seriousness of the deviation of the Attorney General's interpretation is highlighted by the evidence that the prospect of obtaining a JOA in Detroit was an important factor in the decision of both papers to cut prices in the first place. As the Administrative Law Judge concluded,

> [t]he losses incurred by the Free Press and the News are attributable to their strategies of seeking market dominance and future profitability at any cost along with the expecta-

[9]The ALJ's finding, that the applicants had *not* demonstrated that the News is likely to maintain its low prices even if the JOA is denied, reinforces this point. Pet. App. 92a. Although the Attorney General found that the News was likely to maintain its low prices (Pet. App. 143a), his only support for this finding was the ALJ's Finding of Fact No. 107 (Pet App. 143a), where Judge Needelman reached a directly contrary conclusion, namely that the applicants had not carried their burden of proof on this issue. Pet. App. 92a.

> tion that failure to achieve these goals would result in favorable consideration of a JOA application.

Pet. App. 132a-33a. Judge Needelman supported this conclusion by finding that the Free Press had rejected several opportunities to escape the competitive struggle because it believed that it could win dominance in the Detroit market, with the JOA as a cushion to fall back on if it failed. Pet. App. 17a-19a. It is also significant that Gannett purchased the News only after confirming that Knight-Ridder was willing to consider a JOA, and the two newspapers signed the joint operating agreement just two months after Gannett had formally acquired the News. Pet. App. 29a; J.A. 85. As described by Assistant Attorney General Ginsburg, "Gannett and Knight-Ridder demonstrated an almost unseemly haste in considering the possibility of a JOA even before Gannett had successfully bid for the Evening News Association." J.A. 89.

In *Hearst, supra*, 704 F.2d at 478, the Ninth Circuit upheld Attorney General Smith's interpretation of the NPA, which was designed "to prevent newspapers from allowing or encouraging financial difficulties in the hope of reaping long-term financial gains through a JOA." Yet, as Chief Judge Wald lamented, the Attorney General's decision in this case "will, ironically, make it even *more* probable that newspapers will disappear than if the Act had never been passed in the first place." Pet. App. 210a (emphasis in original). For all of these reasons, the Attorney General's decision approving the Detroit JOA is contrary to the Newspaper Preservation Act.

II. *CHEVRON* DOES NOT PROVIDE A BASIS FOR UPHOLDING THE ATTORNEY GENERAL'S DECISION.

Until the decision of the panel below, it had been universally accepted that the Justice Department and the courts are required to construe the Newspaper Preservation Act narrowly because it is an exemption from the antitrust laws. In the only other case where a court construed the exemption, the Ninth Circuit expressly held that this rule of statutory construction applies to the NPA. *Committee for an Independent P-I v. Hearst Corp., supra,* 704 F.2d at 478. In *Hearst*, the court was restating the position of then-Attorney General William French Smith, who had noted, in the decision under review there, that "exemptions from the antitrust laws," such as the NPA, "must be narrowly construed." *See* 47 Fed. Reg. 26,472, 26,473 (June 18, 1982). Similarly, the Assistant Attorney General for Antitrust had issued the same declaration in his report evaluating the application for a JOA in Chattanooga, which Attorney General Benjamin Civiletti incorporated into his decision. Report of the Assistant Attorney General, Public File No. 44-03-25-5, p. 8 n.1 (May 19, 1980); 45 Fed. Reg. 58,733 (September 4, 1980) (Attorney General Civiletti's order).

During the consideration of the Free Press and News's application for a JOA, there was never any indication that the Justice Department intended to disavow this rule of construction. In his initial report on the application, Assistant Attorney General Ginsburg stated, as if the issue were beyond dispute, that "[a]s with all exemptions to the antitrust laws, exemptions for joint arrangements under the Act must be narrowly construed." J.A. 38, *citing Group Life and Health Insurance v. Royal Drug Co., supra,* and *Hearst, supra.* In its Post-Hearing Brief to the Attorney General, the Antitrust Division reiterated the importance of the rule. J.A. 100. Although Attorney General Meese did

not mention the rule in his Decision and Order (Pet. App. 136a-48a), he never indicated that he intended to reject it, or that he believed he would have had the authority to do so. Similarly, in the briefs in the court of appeals, the Justice Department and the newspapers never argued that the Attorney General had any such authority.

Nevertheless, the panel majority found that the Attorney General was excused from applying the rule. It held that *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), "implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable *agency* interpretations of ambiguous statutes." Pet. App. 180a (emphasis in original). As applied to the NPA, the panel majority's decision is wrong.

A. *Chevron* Did Not Alter the Applicability of the Rule That Exemptions From the Antitrust Laws Must Be Narrowly Construed.

In *Chevron*, this Court provided guidance to lower courts reviewing the interpretation and implementation of regulatory statutes by administrative agencies. *Chevron* involved a challenge to the Environmental Protection Agency's regulation defining the term "stationary source" in the Clean Air Act. The regulation permitted the states to adopt a plant-wide definition of stationary source rather than restricting the definition to each device that emitted pollution within a plant.

Both this Court and the lower court held that neither the Clear Air Act nor its legislative history clearly defined the statutory term at issue. Finding that Congress had assigned to EPA the function of implementing this technical statute and that the ultimate decision depended on how one balanced the Act's competing policies ("progress in reducing air pollution [and] economic growth"), the Court held that the Congress had delegated that task to the agency. 467 U.S. at 866. In these circumstances, this Court ruled that any reasonable construction of the statute must be upheld.

Chevron does not give agencies the latitude to ignore established rules of statutory construction, as the panel majority concluded. To the contrary, *Chevron* explicitly held that "[i]f a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, supra*, 467 U.S. at 843 n.9 (emphasis supplied). Moreover, since *Chevron*, this Court has frequently used rules of statutory construction in reviewing agencies' interpretations of statutes. *See, e.g., Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988) (statutes to be construed as not conferring implied authority to issue retroactive regulations). Insofar as we have been able to determine, the Court has never suggested that *Chevron* modifies these traditional rules of statutory construction.[10]

The panel majority never came to grips with the importance of the application of the antitrust rule. That application is firmly embedded in our jurisprudence, *see, e.g., Group Life & Health*

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[10]In addition to *Bowen, see also Amoco Production Co. v. Gambell*, 480 U.S. 531, 555 (1987) (reference to "familiar rule of statutory construction that doubtful expressions must be resolved in favor of Indians," although rule not applicable in that case); *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (reference to "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," although it was unnecessary to rely on the rule in reversing the agency); *Bowen v. American Hospital Association*, 476 U.S. 610, 644 n.33 (1986) (reference to the rule of strict construction of statutes in derogation of sovereignty); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986) ("where possible, provisions of a statute should be read so as not to create a conflict"); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) ("identical words used in different parts of the same act are intended to have the same meaning").

Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979), as this Court has confirmed since *Chevron. Square D Co. v. Niagara Frontier Tariff Bureau,* 476 U.S. 409, 421 (1986) ("exemptions from the antitrust laws are strictly construed and strongly disfavored"). No court had previously suggested that an administrative agency or a court has the authority to ignore it under *Chevron* or any other rationale.[11]

The Court faced an analogous issue in *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trade Council*, 108 S. Ct. 1392 (1988), where the National Labor Relations Board sought enforcement of an order prohibiting a union from distributing handbills urging consumers to boycott a shopping mall. In response to the NLRB's argument that its interpretation of the statute was entitled to deference under *Chevron*, this Court held that any *Chevron* deference was overridden by "[a]nother rule of statutory construction" — the rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 1397. While the antitrust rule at issue in this case may not have the stature of the rule invoked in *DeBartolo*, it too is solidly entrenched in this Court's jurisprudence, and it should also override any deference that would otherwise be required by *Chevron.*

The court of appeals did leave some room for the use of canons of statutory construction. It held that canons could be employed to demonstrate that Congress had a "*specific* intent on the issue in question." Pet. App. 180a (emphasis in original). For example, according to the panel, the canon of *expressio unius est exclusio*

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[11] *See also, e.g., Niagara Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186, 1190-91 (2d Cir. 1987) (court's review of agency action guided by both the rule requiring strict construction of antitrust exemptions and *Chevron*).

alterius might be used to demonstrate that in a statute banning the importation of apples, oranges, and bananas, Congress did not intend to ban the import of grapefruits. Pet. App. 180a-81a. However, the panel claimed that *Chevron* prohibited the courts from applying the canon here, even if such an application would have led to the conclusion that the Attorney General had construed the antitrust exemption too broadly and thereby had violated the Newspaper Preservation Act. Nothing in *Chevron* or its progeny supports this result, particularly since Congress intended that the NPA be narrowly construed. *See* pp. 17-20, *supra.*

Even if the NPA did not directly address the issue raised in this case, this Court made it clear in *Federal Maritime Commission v. Seatrain*, 411 U.S. 726 (1973), that the rule should still be used in determining whether the agency's interpretation of an antitrust exemption is reasonable and supportable. In *Seatrain*, the Court reviewed a decision of the Federal Maritime Commission, that a contract involving the purchase of one shipping company by another was an "agreement" within the meaning of section 15 of the Shipping Act of 1916, 46 U.S.C. § 814, and thus subject to the FMC's approval and grant of antitrust immunity. This Court rejected the Commission's interpretation, even though "the statutory language neither clearly embraces nor clearly excludes discrete merger or acquisition-of-assets agreements." *Id.* at 731. According to the Court, a ruling sustaining the Commission's "broad reading of [the statute] would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed." *Id.* at 733.

The panel's analysis is flatly inconsistent with *Seatrain.* Indeed, applying the panel's method of statutory construction would have led to the opposite result there since this Court relied on the rule to reverse the Commission's expansive construction of the Shipping Act. The panel's error is underscored by this Court's citation to the *Seatrain* decision in *Chevron.* 467 U.S. at 843 n.9.

B. The Court Should Not Defer to the Attorney General's Construction of the NPA.

Even prior to *Chevron*, the principle that agencies' interpretations and applications of statutes were entitled to deference was well-established. *See, e.g., NLRB v. Hearst Publications*, 322 U.S. 111 (1944); *see also Chevron, supra*, 467 U.S. at 843 n.9. However, the lower courts have interpreted *Chevron* as requiring them to give extremely broad latitude to administrative agencies' interpretations of statutes. This is what the panel majority referred to as "*Chevron's* restraining leash." Pet. App. 200a.

We have argued above that this Court's precedents, including *Chevron*, required the court of appeals to apply the antitrust rule to the NPA and that the NPA directly addresses the issue before the Court. However, even if the Court finds that the NPA does not answer the specific issue before the Court, there are four reasons why deference to the Attorney General is not appropriate here.

First, in contrast to the Clean Air Act and other complex regulatory statutes administered by agencies, the antitrust laws have historically been interpreted and enforced by the courts. As this Court stated in *United States v. First City National Bank*, 386 U.S. 361, 367 (1967),

> Traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure.

Although the Bank Merger Act required *de novo* review of the Comptroller's decisions, the Court indicated that Congress had codified the standard of judicial review that had previously been applicable. *Id.* ("We have found no indication that Congress

designed judicial review differently under the 1966 Act than had earlier obtained."). Addressing the argument that Congress had intended it to apply a more relaxed standard of review, this Court concluded that it would have had "to assume that Congress made a revolutionary innovation" to shift the standard of review to the test that is traditionally used in reviewing administrative actions. *Id.* at 368. Finally, in its post-*Chevron* construction of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which does not provide for *de novo* review, this Court adopted a similar approach, holding that, although the FTC is entitled to "some deference," "identification of governing legal standards and their application to the facts found [are] for the courts to resolve." *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986).

The implications of the deference question go far beyond the Newspaper Preservation Act since there are numerous other exemptions from the antitrust laws that administrative agencies are charged with interpreting and enforcing.[12] To interpret *Chevron* as giving agencies an almost unreviewable ability to expand those exemptions would upset the settled expectations of Congress when it enacted those laws.

Second, the NPA and its legislative history demonstrate that Congress expected the courts to construe the Act. Since *Chevron*

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[12] *See, e.g.*, Fishers' Coop Marketing Act, 15 U.S.C. §§ 521, 522 (Secretary of Commerce may order associations to "cease and desist" if he finds that the "association monopolizes or restrains trade . . . to such an extent that the price of any aquatic product is unduly enhanced"); Export Trading Company Act, 15 U.S.C. §§ 4001 *et seq.* (Secretary of Commerce may exempt persons in export trade from antitrust laws upon showing that there will be no "substantial lessening of competition" and no "unfair methods of competition"); Interstate Commerce Act, 49 U.S.C. §§ 11343, 11344 (ICC may approve certain acquisitions and mergers taking into account the "effect . . . on the adequacy of transportation" and whether it would have an "adverse effect on competition").

is founded on the general assumption that Congress intended to grant regulatory agencies broad latitude to fill in gaps in their statutes, an identifiable congressional expectation that the courts would take the lead in interpreting the NPA precludes giving the Attorney General deference otherwise accorded administrative agencies under *Chevron*.

The Senate Committee Report, as well as the debates and statements made at the hearings on the NPA, establish that Congress assumed that the courts would play the principal role in interpreting the definition of "failing newspaper" and in particular the provision requiring proof of "probable danger of financial failure." As we have discussed above, the definition of "failing newspaper" was taken from the Bank Merger Act. In its Report, the Senate Judiciary Committee stated that the phrase had "been the subject of a Supreme Court opinion in *U.S. v. Third National Bank*." S. Rep. No. 91-535, *supra*, p. 2. As Repre. :n-tative Kastenmeier, the House floor leader, described the term:

> It comes out of the Bank Merger Act. *It is understood by the courts in the field, and happens to be a term that is well known.*

116 Cong. Rec. 23,146 (1970) (emphasis added). Numerous other statements made during the course of legislative consideration of the bill also demonstrate that Congress assumed that the courts, rather than the Attorney General, would have the principal responsibility to interpret the NPA.[13]

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[13]S. Rep. No. 535, *supra*, p. 4 ("In applying this definition *the Court* should consider the impact of competition on newspapers as it determines whether a paper is likely to disappear as a competitive factor.") (emphasis added); *id.* at 5 ("The language of section 3(5) is similar to other general standards which *the courts apply in other areas of antitrust law*.") (emphasis added); 1969 House Hearings, *supra*, p. 97 (statement of Rep. Railsback that "I take

(footnote continued)

A comparison of the NPA with the version of the bill initially introduced in the Senate also indicates that Congress assumed that the courts would interpret the Act. Since the NPA does not provide for review by the Attorney General of pre-1970 JOAs, the courts have the sole responsibility for resolving any legal issue pertaining to such agreements. *See* 15 U.S.C. § 1803(a). The bill approved by the Senate Judiciary Committee contained an identical standard for pre-1970 and post-1970 JOAs, but newspapers seeking to operate under a JOA after 1970 would have been required to obtain approval from the Attorney General. S. 1520, 91st Cong., 1st Sess. §§ 3(5), 4(a), 4(b) (1969). If that bill had been enacted into law, the Act would not have been interpreted to mean that the Justice Department could adopt one interpretation of that standard for post-1970 JOAs, while the courts could adopt another interpretation for pre-1970 agreements. *Cf. Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985) (*Chevron* deference not applicable where Congress has entrusted Federal Trade Commission and Justice Department with responsibility under section 7A(h) of the Clayton Act because of possibility of conflicting interpretations). Although Congress ultimately adopted two distinct standards, it did not alter the respective roles of the Attorney General and the courts. Therefore, the sequence

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it that *the courts* have defined what constitutes a failing newspaper?") (emphasis added); *id.* at 110 (statement of Morris J. Levin, Counsel for Tucson Newspapers, Inc. that "[t]o argue that the proposed language of the definition is too broad or generally fails to take into consideration the fact that *the courts have had little difficulty in interpreting similar language in the antitrust laws*") (emphasis added); *see also* 116 Cong. Rec. 2006 (1970) (statement of Sen. Hruska indicating that the failing newspaper standard would be interpreted by "a reviewing court"); *The Newspaper Preservation Act: Hearings on S. 1520 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess., p. 302 (1979) (statement of Senator Hart that "we don't know how a *court* will interpret any piece of legislation") (emphasis added).

of bills that Congress considered supports the argument that it did not intend the courts to defer to the Justice Department in construing the NPA.

Third, to the extent that the deference required by *Chevron* depends on the complexity of the statute or the expertise of the agency, it has little or no applicability here. *See Bowen v. American Hospital Association, supra*, 476 U.S. at 642 n.30. The NPA is not complex, and in contrast to the Clean Air Act and many of the other statutes to which *Chevron* has been applied, the Attorney General has no technical expertise in interpreting it. The basic antitrust laws, such as the Sherman and Clayton Acts, are typically applied and interpreted in the first instance by the courts. Moreover, the expertise in this area resides in the Antitrust Division of the Department of Justice, which disagreed with the Attorney General as to whether the application at issue in this case qualified under the NPA. Thus, the consideration of expertise does not support granting extra deference to the Attorney General's decision in this case.

Fourth, to the extent that *Chevron* depends on the principle that Congress intended executive branch agencies to resolve the competing policies underlying regulatory statutes, it has less applicability here because Congress largely resolved those policies in the statute itself. In the NPA's declaration of policy, Congress identified the two relevant policy considerations: the "public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States"; and the interest in "preserv[ing] the publication of newspapers." 15 U.S.C. § 1801. This statement of policy demonstrates that Congress preferred competing newspapers and that joint operation was to be permitted where the alternative was likely to be the loss of one newspaper. Therefore, the Act prohibits the Attorney General from granting the exemption unless one of the newspapers is in "probable danger of financial failure."

In summary, the Attorney General's decision must be judged against the statute, its structure, its legislative history, and the rule that exceptions from the antitrust laws are to be narrowly construed. Whatever deference may be appropriate, the Attorney General is not entitled to adopt a broad construction of the Act that is inconsistent with both the rule of construction and the underlying purposes of the Act itself.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed, and the Decision and Order of the Attorney General approving the JOA should be set aside.

Respectfully submitted,

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